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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 281.

NELSON VIALL, JAILER, AND CHARLES S. PERHAM AND WILLIAM TWEEDLE, COMMITTING CREDITORS, PLAINTIFFS IN ERROR,

vs.

LUCIUS S. PENNIMAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND.

FILED OCTOBER 17, 1878.

SUPREME COURT OF THE UNITED STATES

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1 *Petition for writ habeas corpus.*

Supreme court, March term, A. D. 1877.

PROVIDENCE, *sc.:*

To the honorable the supreme court, now in session in Providence, within and for the county of Providence:

The petition of Lucius S. Penniman respectfully represents that he is a citizen of the commonwealth of Massachusetts, residing at Blackstone, in said commonwealth; that he is now detained and imprisoned by Nelson Viall, in the Providence County jail, in the city of Providence; that the said Nelson Viall illegally detains him under the pretended authority of a certain second pluries execution issued from the court of common pleas on the 8th day of February, 1876, upon a certain judgment rendered by the court of common pleas on the 25th day of February, 1871, against the American Steam and Gas Pipe Company, a corporation of said Providence, in favor of Charles S. Perham, of Boston, in the commonwealth of Massachusetts, and also under the pretended authority of a certain alias execution issued from this honorable court on the 31st day of May, 1876, upon a certain judgment rendered by this honorable court at its March term, A. D. 1871, against said
2 American Steam and Gas Pipe Company, in favor of William Tweedle, of said Providence; copies of which said commitments under said executions are hereunto annexed and made part of this petition.

And your petitioner further represents that he is detained in said jail for no other cause and under no other commitment than as aforesaid.

And your petitioner further represents that said Charles S. Perham resides in said Boston, and that Messrs. Tillinghast & Ely, of Providence, are his attorneys in this State.

Wherefore your petitioner prays that a writ of habeas corpus may be issued, directed to the said Nelson Viall, jailer, requiring him to have the body of your petitioner forthwith before this court, together with the day and cause of his taking and detaining, and that your petitioner may be discharged from further imprisonment and restraint under said commitments.

LUCIUS S. PENNIMAN.

Subscribed and sworn to at Providence, in said county of Providence, this 28th day of March, A. D. 1877. Before me,

ARTHUR W. DENNIS,
Notary Public.

3 Filed March 28, 1877. Citation issued returnable March 29 1877, at 10 o'clock a. m.

H. A., *A. C'k.*

Commitment of L. S. Penniman.

PROVIDENCE, *sc.:*

JUNE 5TH, 1876.

Committed the body of Lucius S. Penniman, of Blackstone, in the commonwealth of Massachusetts, found and arrested in Woonsocket, in the county of Providence and State of Rhode Island, now and at the

time *of* the judgment debt hereinafter referred to was contracted one of the stockholders and members of the American Steam and Gas-Pipe Company, a corporation created by the general assembly of the State of Rhode Island, said corporation being a manufacturing corporation established in the city of Providence, and subject to the provisions of chapter 128 of the Revised Statutes, and chapter 142 of the general Statutes of this State, and said corporation never having filed any return in the city clerk's office in said city as required by said statutes, and as such stockholder liable for said judgment debt hereinafter referred to, to the Providence County jail for want of the goods and chattels or real estate of him or of the said corporation to be by me found within my precinct whereon to levy and satisfy and pay an
4 alias execution against said corporation in my hands for service; said execution being in favor of William Tweedle, of Providence, in the county of Providence and State of Rhode Island, returnable to the supreme court, to be holden at Providence, in and for said county, on the first Monday of October, A. D. 1876.

The amount of debt and cost in said execution is two thousand one hundred and forty dollars and twenty-seven cents. Judgment was rendered on the 17th day of April, A. D. 1871.

O. C. GOODELL,
Deputy Sheriff.

W. B. BEACH, Esq.,
Plff's Att'y of Record.

Debt, 2,121.32; cost, 18.95; 2 executions, .50; service, 2; percentage, .75; committing, 1.00; 17 m. travel, 1.70—2,146.22.

A true copy. Attest:

NELSON VIALL,
Jailer.

Commitment of L. S. Penniman.

PROVIDENCE, *ss.*:

MAY 4TH, 1876.

Committed the body of Lucius S. Penniman, of Blackstone, in the commonwealth of Massachusetts, found and arrested in Woonsocket, in the county of Providence and State of Rhode Island, now and at the time the judgment debt hereinafter referred to was contracted
5 one of the stockholders and members of the American Steam and Gas Pipe Company, a corporation created by the general assembly of the State of Rhode Island, said corporation being a manufacturing corporation established in the city of Providence, and subject to the provisions of chapter 128 of the Revised Statutes and chapter 142 of the general Statutes of this State, and said corporation never having filed any return in the city clerk's office in said city, as required by said statutes, and as such stockholder liable for said judgment debt hereinafter referred to, to the Providence County jail for want of goods and chattels or real estate of his or of the said corporation to be by me found within my precinct whereon to levy and to satisfy and pay a 2nd pluries execution against said corporation in my hands for service; said execution being in favor of Charles S. Perham, of Boston, in the commonwealth of Massachusetts, returnable to the court of common pleas to be holden at Providence, in and for said county, on the 1st Monday of June, A. D. 1876.

The amount of debt and cost in said execution is $8,774.66. Judgment was rendered Feb'y 25th, 1871.

(Signed) O. C. GOODELL,
Deputy Sheriff.

ASHLEY & COLWELL,
Plaintiff's Att'ys of Record.

Debt, $8,758.36; costs, 16.30; four executions, 1.00; service, 2.00; percentage, 8.77; committing, 1.00; 17 m. travel, 1.70—total, $8,789.13.

6 PROVIDENCE, *sc.:*

JAILER'S OFFICE,
Providence, May 12th, 1876.

I certify that the foregoing is a true copy of amended return of commitment of Lucius S. Penniman at the suit of Charles S. Perham, entered in jail book W, at page 221.

NELSON VIALL,
Jailer.

Citation on petition.

THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,
Providence, sc.:

To the sheriffs of our several counties or to their deputies, greeting:

You are hereby required to notify William Tweedle, James Tillinghast, and Joseph C. Ely, of the city and county of Providence, copartners as Tillinghast & Ely, attorneys for Charles S. Perham, of Boston, Mass., of the filing in our supreme court within and for said county of the petition of Lucius S. Penniman, representing that he is illegally detained in the Providence County jail by Nelson Vial under the pretended authority of a certain second pluries execution issued from the court of common pleas on the 8th day of February, 1876, upon a certain judgment rendered by said court of common pleas Feb'y 25, 1871, against the American Steam & Gas Pipe Co., in favor of said
7 Charles S. Perham, and praying, for reasons in said petition stated, for a writ of habeas corpus directed to said Nelson Vial, requiring him to have the body of him, the petitioner, before said supreme court, and for a discharge from commitment, and also to cite the said respondents to appear before our supreme court now holden at Providence, within and for the county of Providence, on the 29th day of March, A. D. 1877, at 10 o'clock a. m., that they may then and there show cause, if any they have, why the prayer of said petition should not be granted.

Hereof fail not, and make true return of this writ with your doings thereon.

Witness Hon. Thomas Durfee, chief justice of our supreme court, at Providence, this twenty-eighth day of March, A. D. 1877.

[L. S.] CHARLES BLAKE, *Clerk.*

PROVIDENCE, *sc.:*

PROVIDENCE, *March 28th,* 1877.

I have this day at 4 o'clock p. m. notified the within named James Tillinghast and Joseph C. Ely, by reading this citation to them in their presence and hearing, and have also at 5 o'clock p. m. notified the within named William Tweedle by reading this citation to him in his pres-

ence and hearing and by leaving with him in his hands and possession a true and attested copy of this citation.

J. ABORN GARDINER,
Dep'ty Sheriff.

3 services, 2.25; 1 copy, .45; 3 miles travel, .30—$3.00.

8 *Writ of habeas corpus.*

THE STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS,
Providence, sc.:

To Nelson Viall, keeper of the State jail in the county of Providence, greeting:

We command you that the body of Lucius S. Penniman, of Blackstone, in the commonweath of Massachusetts, in our prison in your custody, as it is said, together with the day and cause of his taking and detaining, by whatsoever name the said Penniman shall be called or charged, you have before our supreme court, holden at Providence within and for the county of Providence, immediately after the receipt of this writ, to do and receive what our said court shall then and there consider concerning him in this behalf, and have there this writ.

Witness honorable Thomas Durfee, chief justice of our supreme court, at Providence, this 30th day of March, in the year 1877.

[L. S.] CHARLES BLAKE, *Clerk.*

9 *Copy of commitment of L. S. Penniman with return of jailer.*

PROVIDENCE, *sc.:*

MAY 4, 1876.

Committed the body of Lucius S. Penniman, of Blackstone, in the commonwealth of Massachusetts, corm'orant, of Woonsocket, in the county of Providence and State of Rhode Island (one of the former stockholders of the American Steam and Gas Pipe Company, a corporation created by the general assembly of the State of Rhode Island), to the Providence County jail for want of goods & chattels or real estate of his or of the said corporation to be by me found within my precinct, to satisfy and pay a 2d pleuries execution in my hands for service against said corporation and in favor of Charles S. Perham, of Boston, in the commonwealth of Massachusetts, returnable to the court of common pleas to be holden at Providence, on the first Monday of June, A. D. 1876.

The amount of debt & cost in said execution is eight thousand seven hundred & seventy-four dollars & sixty-six cents.

Judgment was rendered on the 25th day of February, A. D. 1871.

O. C. GOODELL,
Dep'ty Sheriff.

ASHLEY & COLWELL,
Pl'ff's Att'ys.

Debt, $8,758.36; cost, 16.30; 4 executions, 1.00; service, 2.00; percentage, 8.77; committing, 1.00; 17 miles travel, 1.70—8,789.13.

Assignment May 29, '76.

Assigned to Stephen G. Benedict, July 20, 1876.

10 *Copy of commitment of L. S. Penniman with return of jailer.*

PROVIDENCE, *sc.:*

MAY 4, 1876.

Committed the body of Lucius S. Penniman, of Blackstone, in the commonwealth of Massachusetts, found and arrested in Woonsocket, in the county of Providence and State of Rhode Island, now, and at the time *of* the judgment debt hereinafter referred to was contracted, one of the stockholders and members of the American Steam and Gas Pipe Company, a corporation created by the general assembly of the State of Rhode Island, said corporation being a manufacturing corporation established in the city of Providence, and subject to the provisions of chapter 128 of the Revised Statutes and chapter 142 of the General Statutes of this State, and said corporation never having filed any return in the city clerk's office, in said city, as required by said statutes, and as such stockholder liable for said judgment debt hereinafter referred to. to the Providence County jail for want of goods and chattels or real estate of him or of the said corporation to be by me found within my precinct whereon to levy and satisfy and pay a 2d pluries execution against said corporation in my hands for service; said execution being in favor of Charles S. Perham, of Boston, in the commonwealth of Massachusetts, returnable to the court of common pleas to be holden at Providence, in and for said county, on the first Monday of June, A. D. 1876.

The amount of debt and costs in said execution is $8,774.66.

11 Judgment was rendered Feb'y 25, 1871.

O. C. GOODELL,
Dep't'y Sheriff.

ASHLEY & COLWELL,
Plaintiff's Att'ys of Record.

Debt, 8,758.36; cost, 16.30; four executions, 1.00; service, 2.00; percentage, 8.77; committing, 1.00; 17 miles travel, 1.70—8,789.13.

Copy of commitment of L. S. Penniman with return of jailer.

PROVIDENCE, *sc.:*

JUNE 5, 1876.

Committed the body of Lucius S. Penniman, of Blackstone, in the commonwealth of Massachusetts, found and arrested in Woonsocket, in the county of Providence and State of Rhode Island, now, and at the time *of* the judgment debt hereinafter referred to was contracted, one of the stockholders and members of the American Steam and Gas Pipe Company, a corporation created by the general assembly of the State of Rhode Island, said corporation being a manufacturing corporation established in the city of Providence and subject to the provisions of chapter 128 of the Revised Statutes and chapter 142 of the General Statutes of this State, and said corporation never having filed any return in the city clerk's office, in said city, as required by said statutes, and as such stockholder liable for said judgment debt hereinafter referred to, to the Providence County jail for want of the goods and chattels or real estate of him or of the said corporation to be by me found within my precinct whereon to levy and satisfy and pay an alias

12 execution against said corporation in my hands for service; said execution being in favor of William Tweedle, of Providence, in the county of Providence and State of Rhode Island, returnable to the

supreme court to be holden at Providence, in and for said county, on the first Monday of October, A. D. 1876.

The am't of debt & cost in said execution is two thousand one hundred and forty dollars and twenty-seven cents. Judgment was rendered on the 17th day of April, A. D. 1871.

O. C. GOODELL,
Dep'ty Sheriff.

W. B. BEACH, Esq.,
P't'ff 's Att'y of Record.

Debt, 2,121.32; cost, 18.95; 2 execution, .50; service, 2.00; percentage, .75; committing, 1.00; 17 m. travel, 1.70—2, 146.22.

Return of jailer.

PROVIDENCE, *March 31st*, 1877.

I have the body of Lucius S. Penniman as required by the writ of habeas corpus attached hereto, and also a true copy of the commitments on which said Penniman was committed to the Providence County jail.

NELSON VIALL, *Jailer.*

Order releasing L. S. Penniman on bail.

PROVIDENCE, *sc.:*

Supreme court.

In the matter of the writ of habeas corpus in favor of Lucius S. Penniman.

And now the said Lucius S. Penniman having been brought
13 into court on said writ, and the hearing on said writ being continued to Wednesday, April 4th, 1877, it is ordered that the said Penniman be and he is released upon bail upon giving bond to each of his committing creditors, with Henry L. Aldrich and George B. Earle as sureties, said bond to the Perham being in the sum of $15,000.00, and to the said Tweedle in the sum of $2,500.00, for his appearance before said court when required, and for his return to the custody of the jailer or the Providence County jail in case said writ shall be dismissed.

Entered as the order of court 6th day, M. T., 1877 (M'ch 31, '77).
By order.

HERBERT ALMY,
Assistant Clerk.

Filed 6 day, M. T., 1877, March 31st, 1877.

H. A., *A. C'k.*

Bond to Wm. Tweedle.

Know all men by these presents that we, Lucius S. Penniman, of Blackstone, in the commonwealth of Massachusetts, as principal, and Henry L. Aldrich and George B. Earle, of the city of Providence, are holden and firmly bound to William Tweedle, of the city of Providence, in the sum of twenty-five hundred dollars, to be paid to said Tweedle on demand, to the payment of which well and truly to be made we bind ourselves, our heirs, executors, and administrators jointly and

severally firmly by these presents, sealed with our seals and dated this 31st day of March, A. D. 1877.

The condition of this obligation is such that, whereas the said Lucius S. Penniman has sued out of the supreme court, now holden at Providence, within and for the county of Providence aforesaid, a writ of habeas corpus and has been brought before said court on said writ, and has been admitted to bail thereon by said court:

Now, therefore, if the said Lucius S. Penniman shall appear before said court whenever and at all times when he shall be required upon said writ, and shall abide the final order which shall be rendered thereon, or in case said writ shall be dismissed by said court shall return to the custody of the jailer of the Providence County jail, then this obligation to be void; otherwise of full force and effect.

LUCIUS S. PENNIMAN. [L. S.]
HENRY L. ALDRICH. [L. S.]
GEO. B. EARLE. [L. S.]

Signed, sealed, and delivered in presence of—
EDWIN ALDRICH.

Filed March 31st, 1877.

H. A., *A. Ck.*

Bond to Chas. S. Perham.

Know all men by these presents that we, Lucius S. Penniman, of Blackstone, in the commonwealth of Massachusetts, as principal, and Henry L. Aldrich and George B. Earle, of the city of Providence, as sureties, are holden and firmly bound unto Charles S. Perham, of
15 Boston, in the commonwealth of Massachusetts, in the sum of fifteen thousand dollars, to be paid to said Perham upon demand, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this 31st day of March, A. D. 1877.

The condition of this obligation is such that, whereas the said Lucius S. Penniman has sued out of the supreme court now holden at Providence, within and for the county of Providence, a writ of habeas corpus and has been brought before said court upon said writ, and has been admitted to bail thereon by said court:

Now, therefore, if the said Lucius S. Penniman shall appear before said court whenever and at all times when he shall be required upon said writ and shall abide the final order which shall be rendered thereon, or in case said writ shall be dismissed by said court, shall return to the custody of the jailer of the Providence County jail, then this obligation to be void; otherwise to remain in full force and effect.

LUCIUS S. PENNIMAN. [L. S.]
HENRY L. ALDRICH. [L. S.]
GEO. B. EARLE. [L. S.]

Signed, sealed, and delivered in presence of—
EDWIN ALDRICH.

Filed March 31, 1877.

H. A., *A. Ck.*

PENNIMAN, PETITIONER.

PROVIDENCE COUNTY.

Opinion of the court.

Penniman, petitioner for habeas corpus.

DECEMBER 3, 1877.

POTTER, J.:

William Tweedle, of Providence, recovered judgment against the American Steam & Gas Pipe Company, and on the execution against said corporation, for want of the goods and chattels of the corporation or of said Penniman to be found by the officer in his precinct, the officer committed said Penniman to jail, he being, as alleged in said return, a stockholder of said corporation and liable for said debt, said corporation not having made the returns required by statute. Penniman was also committed on a similar execution against said corporation in favor of Charles S. Perham, of Boston.

He was committed by virtue of the provisions of the act concerning manufacturing corporations, Gen. Stat. R. I., cap. 142, § 20, which provides that in certain cases, i. e. when the corporation does not make the return required by § 11 of the same chapter, the persons and property of the stockholders may be taken for a debt of the corporation "on any writ of attachment or execution issued against the company for such debt, in the same manner as on writs and executions issued against them for their individual debts." Section 21 provides that instead of this proceeding the creditor may have his remedy against the stockholders by a bill in equity.

After Penniman's commitment to jail, and while he was in jail, the general assembly of Rhode Island, on March 27, 1877, passed the following act:

CHAPTER 600.

AN ACT defining and limiting the mode of enforcing the liability of stockholders for the debts of corporations.

It is enacted by the general assembly as follows:

SECTION 1. No person shall hereafter be imprisoned, or be continued in prison, nor shall the property of any such person be attached, upon an execution issued upon a judgment obtained against a corporation of which such person is or was a stockholder.

SEC. 2. All proceedings to enforce the liability of a stockholder for the debts of a corporation shall be either by suit in equity, conducted according to the practice and course of equity, or by an action of debt upon the judgment obtained against such corporation; and in any such suit or action such stockholder may contest the validity of the claim upon which the judgment against such corporation was obtained, upon any ground upon which such corporation could have contested the same in the action in which such judgment was recovered.

SEC. 3. All acts and parts of acts inconsistent herewith are hereby repealed.

SEC. 4. This act shall take effect from and after the date of the passage thereof.

And Penniman now applies for his release under this act.

His application is opposed on the ground that the new act, so far as it affects contracts made before its passage, is void under the provisions of the Constitutions of the United States and of this State as impairing the obligation of a contract.

If it merely concerned the constitution of this State we should not need so extended an examination of authorities. But as it concerns the Constitution of the United States also, although the principles of decision should be the same, we are obliged to refer to the decisions of the United States courts.

Does the act in question impair the obligation of a contract? If so, it is of course invalid.

17 The distinction between acts which undertake to repeal those portions of a charter which constitute a contract between the stockholders, or to vary the terms or construction of a contract, and acts which only affect the remedy provided by the laws in force when such contract was made, was very early taken. Sturges v. Crowninshield, 4 Wheat. 122, 152,200; and it would seem from the unreported cases mentioned in Mr. Hunter's argument, pp. 136, 137, that the distinction must have been made much earlier.

And in relation to acts which merely affected the remedy this serious difficulty arose. If a State legislature could abolish or take away the remedy, this would practically destroy the contract, although its moral obligation might still remain. And on the other hand, if the contracting party is entitled, as long as the contract continues, to the same remedy to enforce it which existed when the contract was made, we should have the strange spectacle for a country of equal and general laws, priding itself upon its freedom from special privileges, of different sets of laws in force at the same time for enforcing contracts of the same nature merely because such contracts had been made at different times.

Although generally contracts would soon expire, yet there are perpetual contracts, and there would be more of them, especially as regards real estate, if the law allowed the parties to retain all existing remedies. In the case of perpetual leases in fee we have one instance of what might be done. We should have parcels of land in the same neighborhood practically governed by very different laws.

In the case of the leases of the Rensselaer manor in New York a provision was incorporated in the contract which was for a perpetual lease in fee, giving the right of distress for rent and detailing the mode of distraint. The legislature abolished distress for rent. The courts in New York held that the legislature might take away any particular remedy, provided they left an efficient remedy, and the cases, so far as we are informed, were never carried further. (Guild v. Rogers, 8 Barb. S. C. 502; Van Rensselaer v. Snyder, 9 Barb. S. C. 302; and on appeal, 13 N. Y. 299; Conkey v. Hart, 14 N. Y., 22, 30.)

So in the case of the old Rhode Island Bank charters. The old Providence Bank was chartered November, 1791, the Rhode Island Bank October, 1795, and these charters contained a provision that when a note fell due and was unpaid for ten days after demand, the bank might summarily attach property and hold it to answer the suit, and the legislature had not reserved in the charter nor by general law the right to alter or repeal the terms of the charter. This right to attach was a special privilege, ordinary persons having no right to attach property unless the defendant was absent from the State. Similar provisions were inserted in charters passed during the following twenty years.

This was familiarly known as bank process. In February, 1818, it was given to all banks by general law and without requiring any previous demand. In June, 1836, it was repealed as to all subsequent debts, and it was provided that banks should collect their debts by ordinary process and not otherwise, yet no question was ever raised as to the right of the legislature to take away this peculiar process. See also acts of February, 1820, October, 1820, October, 1821, and the laws of 1822, and the act of January, 1823; also the report of Mr. Durfee of Tiverton, who was afterwards chief justice, made to the House of Representatives, February 25, 1820, and published in the Providence Gazette. There were similar laws in Virginia, Maryland, and other States. (See Bank of Columbia v. Okely, 4 Wheat. 235, and Young v. The Bank of Alexandria, 4 Cranch, 384.)

And cases of covenants for quiet enjoyment and for warranty in deeds would also furnish instances.

In the Middle Ages we have indeed the example of countries where different nationalities were intermingled each retaining its own laws. But they generally were cases of conquest, where the conquering race, while introducing its own laws for itself, permitted the conquered to retain their old laws for the regulation of all their private affairs and relations.

18 It became necessary for the courts to draw some line of distinction defining the powers of the State legislatures in such cases. This has been done, and it is best to state it in the language used by the judges of the United States Supreme Court, as with them the decision of all such questions, so far as concerns the United States Constitution, ultimately rests.

Says Judge Story, after remarking that an abolition of all remedies would be impairing the obligation of the contract: "But every change and modification of the remedy does not involve such a consequence. No one will doubt that the legislature may vary the nature and extent of remedies so always that some substantive remedy be in fact left. * * * And a State legislature may discharge a party from imprisonment in a civil case of contract without infringing the Constitution; for this is but a modification of the remedy, and does not impair the obligation of the contract." (Story on Const., § 1385.)

"Nor would a State law discharging a party from imprisonment under a judgment upon a contract, though passed subsequently to the imprisonment, be an unconstitutional exercise of power; for it would leave the obligation of the contract undisturbed. The States still possess the rightful authority to abolish imprisonment for debt, and may apply it to present as well as to future imprisonment." (Story on Const., § 1398.)

The doctrine of the latter part of the foregoing section is founded upon the decision of the United States Supreme Court in Mason v. Haile, (12 Wheat., 370, 378.) "Can it be doubted but the legislatures of the States, so far as relates to their own process, have a right to abolish imprisonment for debt altogether, and that such law might extend to present as well as future imprisonment? We are not aware that such a power in the States has ever been questioned. And if such a general law would be valid under the Constitution of the United States, where is the prohibition to be found that denies to the State of Rhode Island the right of applying the same remedy to individual cases? This is a measure which must be regulated by the views of policy and expediency entertained by the State legislatures. Such laws act merely upon the remedy, and that in part only. They do not take away the entire remedy, but only so far as imprisonment forms a part of such remedy. The doctrine

of this court in the case of Sturges v. Crowninshield (4 Wheat., 122, 200), applies with full force to the present case. 'Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the State may refuse to inflict this punishment, or may withhold this means and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation.'"

And it is a noticeable fact that the case of Mason v. Haile (12 Wheat. 370) grew out of the practice, formerly prevalent in Rhode Island, of passing special acts of the legislature for each particular case, granting release from imprisonment or complying with the terms of the old insolvent act of 1856, which had long been repealed as a general law. Haile was committed on the execution issued on the judgment against him, and had given bond for the liberty of the yard, as it was called, i. e., to remain within the statutory limits of the jail yard. He had taken the poor debtors' oath, and was still detained on the limits by his creditors paying his jail board. In this stage of the case the legislature granted his petition for a discharge, and he was discharged. Suit was brought on his jail bond on the ground that the legislature could not discharge him. His discharge was lawful if the legislative act was constitutional. And it is evident that the fact that the act was a special one was fully before the minds of the court. (See, also, Beers et al. v. Haughton, 9 Pet., 329, 359; Gray, Sherwood & Co. v. Munroe et als., 1 McLean, 528; Records of General Assembly R. I., February, 1816.)

And Judge Cooley says (Constit. Limitations, 3d ed., 287): "It has accordingly been held that laws changing remedies for the enforcement of legal contracts will be valid even though the new remedy be less convenient than the old, or less prompt and speedy."

19 The latter part of this paragraph is founded on the decision of the United States Supreme Court in Bronson v. Kinzie et als. (17 Pet. 28; 1 How. U. S. 311.) Although it was not decisive of the case, yet it was necessarily considered, and has been over and over again so laid down in the text books, and seems consistent with other decisions.

The counsel for the creditors has referred us to this case, Bronson v. Kinzie et als., as showing a disposition on the part of the United States Supreme Court to retrace its steps.

The legislature of Illinois had passed two acts, one giving a mortgagor whose land was sold under a decree in chancery a right to redeem; and another prohibiting a sale under such a decree unless for two-thirds of an appraised value. The validity of these two acts was discussed by the court. Taney, C. J., delivered the opinion: "If the laws of the State had done nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection. For, undoubtedly, a State may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations." * * * "And, although a new remedy may be deemed less convenient than the old one, and may, in some degree, render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced it is immaterial whether it is done by acting on the remedy or directly on the contract itself." (1 How. U. S. 315, 316.) And the court go on, p. 317, to explain their meaning, by saying

that the obligation of the contract may be seriously impaired "by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing." The court held, p. 320, that the new law gave to the mortgagor an equitable estate in the land, which he did not have under the original contract of mortgage, and that the other act imposed conditions which would often render a sale impossible, and besides was confined to past contracts. These are the principles laid down by the court.

McLean, J., p. 322, dissented, on the ground that the question of constitutionality had not been argued, and its decision was not necessary in the case; he held to the broader ground as expressed in the opinion of Marshall C. J., in Sturges v. Crowninshield, (4 Wheat. 122, 200,) that the remedy was no part of the contract; and argued strongly that any other doctrine would leave every case at the mere discretion of the court. Every contract, he contended, p. 330, was entered into with a supposed knowledge that the law making power could control the remedy.

And the decision in this case was subsequently referred to and approved in McCracken v. Hayward, (2 How. U. S. 608, 613.)

The case of Hawthorne v. Calef (2 Wall. 10) is instructive. The legislature of Maine had provided in a charter that if no property of the corporation could be found, the property of the stockholders should be liable, and the execution against the corporation might be levied on the property of a stockholder in the same manner as if the execution was against him personally, or the creditor might have an action of the case against him.

The plaintiff sued the corporation, and, getting nothing, sued the defendant. The legislature of Maine, a few months after the debt was contracted, repealed the individual liability clause of the charter.

The supreme court of that State sustained the act, on the ground that, as the charter did not make the stockholder personally liable, but only his property, it could not be called a contract within the meaning of the Constitution of the United States.

20 The case came before the United States Supreme Court in 1864, and the decision of the State court was reversed. Nelson, J., in delivering the opinion of the court, says, speaking of the charter remedy: "This remedy the repealing act has not merely modified to the prejudice of the creditor, but has altogether abolished, and thereby impaired the obligation of his contract with the company" (2 Wall. 23), the court holding that the stockholders had virtually agreed to become security to the creditors for the debts of the corporation.

In Van Hoffman v. City of Quincy (4 Wall., 535, 553) the court say: "The right to imprison for debt is not a part of the contract. It is regarded as penal rather than remedial. The States may abolish it whenever they think proper. (Beers et al. v. Haughton, 9 Pet., 359; Ogden v. Saunders, 12 Wheat., 230; Mason v. Haile, 12 Wheat., 373; Sturgis v. Crowninshield, 4 Wheat., 200.) They may also exempt from sale under execution the necessary implements of agriculture, the tools of a mechanic, and articles of necessity in household furniture." "It is competent for the States to change the form of remedy or to modify it otherwise as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. * * * If these doctrines were res in-

tegræ, the consistency and soundness of the reasoning which maintains a distinction between the contract and the remedy, or, to speak more accurately, between the remedy and the other parts of the contract, might perhaps well be doubted. (1 Kent Com., 456; Sedgwick on Stat. & Constit. Law, 652; Washington, J., dissenting, in Mason v. Haile, 12 Wheat., 379.) But they rest in this court upon a foundation of authority too firm to be shaken, and they are supported by such an array of judicial names that it is hard for the mind not to feel constrained to believe they are correct. The doctrine upon the subject established by the latest adjudications of this court renders the distinction one rather of form than substance."

This is stating it almost as strongly as Judge Marshall had previously stated it in Sturgis v. Crowninshield (4 Wheat., 122, 200). "Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation may direct."

The United States Supreme Court, in the Planters' Bank v. Sharp et al. (6 How. U. S., 301, 327), observed that "one of the tests that a contract has been impaired is that its value has by legislation been diminished;" and this remark is quoted in Von Hoffman v. City of Quincy (4 Wall., 535); and the court, p. 553, take occasion to explain and qualify it. "This," they say, "has reference to legislation which affects the contract directly, and not incidentally or only by consequence. The right to imprison the debtor is not a part of the contract. It is regarded as penal rather than remedial. The States may abolish it whenever they think proper."

We have quoted freely from the United States Supreme Court, because it is by the rules they lay down for the construction of the United States Constitution and by the spirit of them that we must decide this case, and not by our own views of what the law ought to be.

Let us examine the present case in the light of those decisions.

It is very plain that the new act does not attempt to do any one of several things which have been heretofore held to invalidate such acts. It does not postpone payment of the debt nor impose any condition on it. It does not annul the judgment against the corporation or in any manner reopen it, or, as the respondents contend, grant a new trial so far as the corporation is concerned; nor does it authorize the corporation to make any new defence it could not have made before; or does it even authorize the stockholder to make any new defence; he
21 can only make, and that for his own protection only, such defence as the corporation could have made; it merely protects him against the fraud or negligence of its officers. The distinction in regard to allowing new defences is well laid down by Judge Cooley: "If the new defence would defeat a contract previously valid, or take away any right assured to the party by it," then it would be in conflict with the Constitution of the United States. "But if the new defence only presents legal objections in some new way, or is designed only to make available an existing equity, the provision for it should be regarded as affecting the remedy only," and therefore admissible.

The counsel for the creditors has referred us to Pomeroy on Constitutional Law, which states the doctrine in favor of the creditor as strongly as it can be stated consistently with the decisions. He states as elements necessary to the efficacy and perfection of the remedy: 1st. The right to bring an action as soon as is permitted by the ordinary procedure; 2d. The right to obtain a judgment as soon as possible according to the ordinary modes of proceeding; 3d. "The right to enforce this judgment as soon and as efficiently as is allowed by the same gen-

eral methods of practice." State laws interfering with these impair the obligation of the contract. "But the modes of judicial procedure have nothing in them intrinsically connected with the remedial right. * * * They * * * may be changed whenever new notions of policy become controlling, or an altered condition of society or of business requires another arrangement. Among these matters which belong to procedure are * * * the forms of action and of pleading by which the claims and defences of parties shall be presented; the periods of time given in which to respond; * * * the time within which judgment may be enforced, provided such period be fairly referable to that general convenience of courts and of suitors which lies at the basis of all established modes of practice, and be not a merely arbitrary delay which unnecessarily hinders the creditor. A change in these and such like matters does not affect the remedial right itself, and does not impair the obligation of even existing contracts." §§ 612, 613.

And in § 609 Pomeroy says the decisions of the United States Supreme Court have established and applied the rule, that materially altering or postponing the existing remedy, or imposing new conditions upon it, which substantially interfere with its present conditions, have the effect to impair the obligation of the contract.

It is difficut to see how the new act violates any of the conditions laid down in this treatise.

It does not in the least alter or diminish the liability either of the corporation or of the stockholder on the contract.

The counsel for the creditors have referred to Hawthorne v. Calef (2 Wall. 10), as being like this case. We cannot perceive any similarity whatever. In that case the legislature of Maine, after the debt was incurred, repealed the liability clause of the charter. And in the often cited case of Green v. Biddle (8 Wheat 1) all remedy was taken away. So also in Planters' Bank v. Sharp et al. (6 How. U. S. 301). So also in Gunn v. Barry (15 Wall. 610), where the court say the remedy was not impaired but annihilated, and the lien acquired by judgment taken away.

What, then, does the new act of 1877 do? It abolishes the imprisonment; and if we can rely at all upon judicial language the United States Supreme Court have in many cases, and by various judges, decided that this may be done; and that it may even be applied to existing cases; and in the case of Mason v. Haile that it may be done by special act, after the debtor had, as in this case, been committed on execution.

Upon the constitutionality of State insolvent laws, so far as they undertake to release future acquired property from liability for past debts, there has been at times great conflict of opinion among the judges, and so too as to their effect upon contracts subsequently made, and as to the place of contract. But upon the point now before us, the
22 right to liberate the body from imprisonment, there has never been, so far as we are aware, any difference of opinion. See also Planters' Bank v. Sharp et al. (6 How. U. S. 301, 328).

The new act further provides that the debtor's property shall not be attached on the execution against the corporation.

The former law contained a provision that the execution against the corporation, even if the corporation had a valid defence which either fraudulently or negligently it had not made, might be levied on the stockholders' property without any notice to him or hearing whatever. Whether this could be constitutionally done or not is not now the question. It is attempted to be justified on the ground that when a person becomes a stockholder he consents to it. See Hawthorne v. Calef (2

Wall. 10, 22). The court observes that he virtually agrees to become security for the debts, and quotes Chancellor Jones in Corning v. McCullough (1 N. Y. 47, 49), as holding that he becomes concurrently liable. But it would be considered a strange proceeding to give a creditor a right, on getting judgment against one man, to levy his execution on the property of a surety or joint promisor, without notice to the latter or opportunity to dispute the claim.

In the Bank of Columbia v. Okely (4 Wheat. 235), the bank had a right by its charter to attach the property of its debtors on original process against any person indebted to the bank on bills or notes expressly made negotiable at said bank.

On a motion to quash the execution as being against constitutional right, it was argued that the debtors by signing the note had consented to the jurisdiction and process. The court rejected the motion, mainly, as it would seem, on the ground that a trial by jury was secured to the debtor by the act. But they go on to say that they would ponder long before they would sustain this action, if they could be persuaded that the act in question produced a total prostration of the trial by jury, or even involved the defendant in circumstances which rendered that right unavailing for his protection.

In this case the debtor had by his signature admitted the debt. And, furthermore, his right to trial by jury was saved to him.

Allowing that one person may give to another a power to confess judgment against him for a definite or ascertainable sum, it would not follow that he might waive permanently his right to a trial by jury and other constitutional privileges.

The question would somewhat resemble the one sometimes agitated of the right of a man to sell himself into perpetual slavery.

Some judges, Conant v. Van Schaick (24 Barb. S. C. 87), and cases there cited, have compared the liability here imposed to that of partners. An ordinary charter gives all the advantages of partnership, with the additional advantages of an immunity from private liability. And they argue that the old law in this case operated merely to take away the immunity; and that the stockholder by becoming such has consented to it. But it is believed that the records of courts will be searched in vain for a case where, upon a judgment against partners, the law has allowed the execution to be levied on the separate property of one who had no notice of the suit. Fictions have generally been invented by the courts to subserve the purposes of justice. Not so here.

Although no question of the constitutionality of the old law is raised here, these considerations are important as showing the superior equity of the new law over the old one.

A person may authorize an agent to make a bargain, and be bound by the authority he has given. But he certainly ought not to be deprived of the right to a trial by jury upon the question whether any legal contract was ever made by his agent.

It is argued that the corporation was trusted on the ground of this liability; true, perhaps, but not on the ground of the particular mode in which that liability is to be enforced, and more especially if one equally available is provided.

The remedy by bill in equity, the most just of all because it would compel all to pay in proportion, might be tedious, but not
23 necessarily so; and if delay attends it, it can be no serious ground of objection to the new act, for the old act also provided the same remedy.

In place of the power to levy without notice or service of any kind

upon private property, the new act substitutes an action of the case; and the sole privilege granted by the new act which is not contained in the old one is, that if the corporation had any valid defence to the action the stockholder may set it up to the same extent the corporation might have done.

And while it repeals the provision by which his property could be levied upon on the execution against the corporation, without notice to him or opportunity for defence, it leaves his property entirely open to attachment and his person to arrest in the new action which it gives against him personally, and interposes no delay other than necessarily attends all litigation.

Under our laws the creditor gains no lien by his judgment; but if in the present case he claimed to have a lien by levy of execution on property, and the legislature had then undertaken to repeal the old remedy and divest the lien so claimed, the question would have been different from the one before us. (See Gunn v. Barry, 15 Wall., 610, 622.)

The petition must therefore be granted and the discharge ordered.

STINESS, J., concurring:

I concur in the opinion of Mr. Justice Potter, though somewhat reluctantly.

Without here referring to all the decided cases of a character similar to this, it is sufficient to say that the Supreme Court of the United States has declared those acts to "impair the obligation of a contract"—

a. Which discharges a contract without performance. (Sturges v. Crowninshield, 4 Wheat., 122; Hawthorne v. Calef, 2 Wall., 10.)

b. Which impose such new conditions upon the sale of a debtor's property as materially to hinder and possibly to prevent a creditor from selling it to satisfy his judgment. (Bronson v. Kinzie, 1 How. U. S., 311; McCracken v. Hayward, 2. How. U. S., 608.)

c. And which withdraw, by exemption, so much of the debtor's property from "the obligation of the contract" as practically to annihilate it. (Gunn v. Barry, 15 Wall., 610.)

It has declared those acts to be valid which affect only the remedy. (Mason v. Haile, 12 Wheat., 370.)

In Bronson v. Kinzie, Mr. Chief Justice Taney says: "And although a new remedy may be deemed less convenient than the old one and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional."

Where a charter gave to a bank a summary process by execution against its debtors, the court says: It is the remedy and not the right; and, as such, we have no doubt of its being subject to the will of Congress." (Bank of Columbia v. Okely, 4 Wheat., 235, 245.)

Acts which simply release a debtor from imprisonment have uniformly been upheld.

Now this act relates simply to the remedy, i. e., to the form and course of proceeding, and does not discharge the debtor nor withdraw any of his property from the obligation of the contract. It does not prevent the attachment of any portion of it to be held for this debt, nor burden it with new conditions; it is liable at once to be levied on to answer to the judgment against the corporation, and the contract of the corporator to be personally liable for the debt of the corporation is as binding on him as ever; but the creditor must bring a new suit and obtain judgment against the individual before his property shall be applied to pay the debt of the corporation and before he shall "be imprisoned or be continued in prison."

This is a change in the remedy, and I cannot say that it deprives the creditor of all remedy or so abridges his remedial rights as to impair the obligation of the contract itself or leave him one "hardly worth pursuing.' Hence I am constrained to hold, following the decis-
24 ions of the Supreme Court of the United States upon this provision—the language of our constitution in this respect is identical with that of the Federal Constitution—that this act is not unconstitutional.

Indeed, as to future contracts, it seems more consonant with reason and justice that a corporator should have some personal notice before his person or property is taken for the debt of the corporation.

Nevertheless, it cannot be denied that this act is very detrimental to the interest of the creditor whose claim accrued under the old law. To be compelled to submit to the postponement, trouble and expense of a new suit, while it may not impair the obligation of the contract, as that phrase has been defined, most clearly impairs the value of that obligation; and it is easy to conceive that many corporations have received credit simply from the existing liability of the stockholders and the summary process to enforce it.

This act, therefore, comes very near to the limit of the constitution, if it does not transcend it.

I must say that the reasoning seems to me to be the stronger which holds that an act "to lessen or take away from the extent and efficacy of the remedy to enforce the contract, legally existing when the contract was made, impairs its value and obligation." (1 Kent, 12th ed., § 456, note *a*: Sedgwick on Stat. & Constit. Law, 630.)

But by respect for the high authority of the Supreme Court of the United States interpreting the Federal Constitution, and by the principle "Stare decisis, et quieta non movere," I am led to the conclusion stated.

DURFEE, C. J., dissenting:

The petitioner, who has been brought before us on a writ of habeas corpus, seeks to be liberated from the Providence County jail, where he is imprisoned on an execution against the American Steam & Gas Pipe Company, a manufacturing corporation created by the general assembly and established in the city of Providence. The petitioner is or was a member of the corporation, and was committed under chapter 128 of the Revised Statutes and chapter 142 of the General Statutes; the certificate required to exempt him from personal liability never having been filed in the city clerk's office as provided by those statutes. The legality of the commitment, as originally made, is not now questioned; the petitioner claims release under an act recently passed, to wit, chapter 600 of the public laws. The first section of the act is as follows:

"No person shall hereafter be imprisoned or be continued in prison, nor shall the property of any such person be attached, upon an execution issued upon a judgment obtained against a corporation of which such person is or was a stockholder."

The section completely abolishes the remedy at law given by previous statutes for the enforcement of a stockholder's liability. The committing creditor contends that the section should be construed as applying only prospectively, and not retrospectively, to a case like the case at bar where the remedy is in process of enforcement and the stockholder has already been committed. The language of the section is, in my opinion, too plain to admit of such a construction. The section was, I

have no doubt, designed to apply to a case like the case at bar, if not enacted directly in view of its applying to the case at bar.

The committing creditor contends that if the section is applicable in the case at bar it is unconstitutional, because it impairs the obligation of the contract under which the petitioner was committed. This point cannot be properly considered without considering it in connection with the second section of chapter 600, which gives a new remedy in substitution for the remedy abolished by the first section. The second section is as follows:

"All proceedings to enforce the liability of a stockholder for the debts of a corporation shall be either by suit in equity, conducted according to the practice and course of equity, or by an action of debt upon the judgment obtained against such corporation; and in any such suit or action such stockholder may contest the validity of the claim upon which the judgment against such corporation was obtained, upon any ground upon which such corporation could have contested the same in the action in which such judgment was recovered."

By the third section of chapter 600 all acts and parts of acts inconsistent therewith are repealed.

The new remedy given by the second section is not the remedy by suit in equity, for that existed under the previous statutes, but the remedy by "an action of debt upon the judgment obtained against the corporation." The petitioner contends that this remedy, or this together with the remedy by suit in equity, is a sufficient substitute for the remedy abolished by the first section, and that therefore the committing creditor cannot justly complain that the obligation of his contract with the corporation is impaired.

Previous to the enactment of chapter 600, the remedy at law was a service of the execution, issued against the corporation, upon the persons and property of the stockholders, in the same manner as if the execution were an execution against them for their individual debts. The remedy, once the judgment was recovered against the corporation, was perfect; for the execution, issuing thereon against the corporation, could be served upon the person or property of any stockholder within the State. Under the law, as altered by chapter 600, if chapter 600 is constitutional, an execution issuing against the corporation can be served only upon the corporate property. Upon such an execution the person or property of the stockholder can no longer be touched. If the creditor wishes to pursue the stockholder at law, he must bring an action of debt against him upon the judgment recovered against the corporation, and must fight the action through again to final judgment against the stockholder, who is authorized to contest his claim upon any ground upon which it would have been contested by the corporation. It must be confessed that the alteration of the law is very detrimental to the creditor. The question is whether, considering the fact that the remedy in equity remains, the obligation of the contract must be held to have been impaired by so detrimental a change in the remedy given for its enforcement at law.

There are cases which maintain that any change in existing remedies is permissible so long as existing contracts are not left without the means of enforcement. If this view is correct, chapter 600 is clearly not unconstitutional. I think the view is erroneous. What is the obligation of a contract? Without pretending to answer the question in full, I reply that the obligation of a contract is that which obliges the parties to perform it, and that which obliges the parties to perform it is the law which may be resorted to in case of default, to compel the defaulting

party either to perform it or to make compensation for not performing it. It follows that any change of the law which impairs the compulsive or remedial efficacy of the law in this respect, necessarily impairs the obligation of any contract which has been entered into under it. A contract is legally obligatory only because of the remedies given to enforce it. An oral guaranty, for instance, does not bind the guarantor, simply because no action can be maintained on it. And this is the doctrine of the Supreme Court of the United States, as declared in Curran v. The State of Arkansas (15 How. U. S. 304). The court there said, p. 219: "The obligation of a contract, in the sense in which these words are used in the Constitution, is that duty of performing it which is recognized and enforced by the laws. And if the law is so changed that the means of legally enforcing this duty are materially impaired, the obligation of the contract no longer remains the same." The same court, in the earlier case of McCracken v. Hayward (2 How. U. S., 608, 612) said: "The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made: these are necessarily referred to in all contracts, and form a part of them, as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law diminish the duty or impair the right, it necessarily bears on the obligation of the contract in favor of one party to the injury of the other. Hence any law which, in its operation, amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution." (See Bronson v. Kinzie, 1 How. U. S., 311; Gantly's Lessee v. Ewing, 3 How. U. S., 707, 717; Pomeroy's Const. Law, § 619 et seq.) The same view has been expressed by several State courts. (Oliver v. McClure, 28 Ark., 555, and cases there cited; Rosier v. Hale et al. 10 Iowa, 470.) In Scobey v. Gibson (17 Ind., 572) the court remarked: "Any legislation, professedly directed to the remedy, which deprives the party of one substantially as efficient as that existing at the making of the contract, does impair the obligation of the contract." And in Townsend v. Townsend (1 Peck Tenn., 1), the language of the court was: "The law is the source of the obligation, and the extent of the obligation is defined by the law in use at the time the contract is made. If this law direct a specific execution, and a subsequent act declare that there shall not be a specific execution, the obligation of the contract is lessened and impaired." And the court added: "The legislature may alter remedies; but they must not, so far as regards antecedent contracts, be rendered less efficacious or more dilatory than those in being when the contract was made, if such alteration be the direct and special object of the legislature apparent in the act."

26

It is true the doctrine is not to be pressed to an extreme, for the law is reasonable as well as logical, and, accordingly, it has been held that an alteration of the law which only affects the forum, or form of procedure, but leaves the substance of the remedy unimpaired, or that merely changes a rule of evidence, or the police regulations of the State, though it may incidentally affect the rights of parties under existing contracts, is not necessarily unconstitutional on that account. (Cooley's

Const. Limit., 284 et seq.) I am not prepared even to say that a law is void which abolishes a remedy, if it substitutes another substantially as efficient. But the change effected by chapter 600 cannot be classed with these permissible changes. It abolishes a remedy that is convenient and summary, and substitutes for it a remedy which is far more dilatory, expensive, and uncertain. And this change appears to have been directly designed by the legislature. It is vain to argue that the creditor is not worsened by it. His contract is no longer as effectively obligatory. I cannot avoid the conclusion (the new remedy notwithstanding) that its obligation is impaired. The fact that the remedy in equity is still preserved does not prevent this, for the remedy at law was as simple as it was formidable, and for that reason, after judgment recovered against the corporation, was far more efficient than the remedy in equity. I therefore think chapter 600 is, so far as regards prior contracts, unconstitutional.

But because this is so, does it follow that the petitioner is not entitled to be released? Is it not possible that chapter 600 may be constitutional in so far as it prohibits imprisonment on an execution against the corporation, though, as respects existing contracts, it is unconstitutional in its further prohibitions? The committing creditor contends that the act is a connected whole, and, therefore, cannot be sustained at all unless it can be wholly sustained. Much can be said in favor of this view; but supposing the different clauses of the act are not so interdependent, and that the provision against imprisonment may be separated from the rest, the question then is, whether the provision in itself is constitutional or not. In considering this question it will be well first to
27 see exactly what is the effect of the provision. It utterly takes away the right of imprisonment on an execution against the corporation. It does not even reserve the right to the creditor upon proof of fraud. It the right has already been exercised, and a stockholder has been imprisoned before the enactment of chapter 600, he is to be liberated at once without making any assignment, and without undergoing any judicial examination. The petitioner is so imprisoned. If chapter 600 is constitutional, he is liberated by the simple fiat of the legislature, though he may have abundant means, and may have them so invested or so concealed that they cannot be reached by any process running simply against his property. If he had no property when he was imprisoned, and had been guilty of no fraud, there was nothing to prevent his then taking the poor debtors' oath. The question recurs, whether a provision which has or may have such an effect is constitutional?

I think it is settled that a State has the power, even as regards existing contracts, to abolish imprisonment for debt, in the manner in which it is usually abolished; that is to say, excepting in cases of fraud on the part of the debtor, committed either in contracting the debt or in concealing or withholding his property. I think it is also settled that a State has the power to authorize the liberation of a debtor lawfully imprisoned for debt, upon judicial proof of his insolvency, and on his making an assignment for his creditors. (Sturgis v. Crowningshield, 4 Wheat., 122, 200; Mason v. Haile, 12 Wheat., 370; Beers et al. v. Haughton, 9 Pet., 329, 359; Gray, Sherwood & Co. v. Munroe et al., 1 McLean, 528; Woodfin v. Hooper, 4 Humph., 13; Newton v. Tibbats, 7 Ark., 150; Bronson v. Newberry, 2 Dougl. Mich., 38; Donnelly v. Corbett, 7 N. Y., 500.) The law is so settled on perfectly valid reasons. If a debtor has no property wherewith to pay his debt, imprisoning him cannot oblige him to pay it, and, therefore, it does not impair the obli-

gation of his contract to exempt or release him from imprisonment. It is true imprisoning him may induce his relatives or friends to pay the debt in order to ransom him from confinement; but certainly the State is not required to perpetuate the remedy on that account, for it is not to be supposed that anything so barbaric was within its original design.

But this reasoning does not apply where the debtor has property, especially if the property is concealed, intangible, or out of the jurisdiction. It is a mockery in such a case to say the creditor is not prejudiced because the debt and the debtor's property remain, for it is only through the debtor that the property can be reached. It may be, indeed, that the law pledging the body of the stockholder was the very ground upon which the credit was given; for, at a time like this, when coupon bonds are so plentiful, nothing would be easier than for a wealthy man, if there were no imprisonment for debt, to defy his creditors while retaining his property. It is true, in the case at bar, there is no proof that the petitioner has property, except the fact that he has not taken the poor debtors' oath; but there is likewise no proof of the contrary; and the law allows him to go at large without first proving his insolvency, and does not allow the creditor to detain him, even upon proof that he is abundantly solvent. Can it be that such a law is constitutional? It has been decided by the Supreme Court of the United States that the contract with the corporation is virtually a contract with the stockholders. (Hawthorne v. Calef, 2 Wall., 10.) The obligation of the contract, considered as a contract binding the stockholders, is defined by the liabilities annexed to it by statute, and the statute expressly subjects the stockholders, on execution against the corporation, to liability in their persons as well as in their property. How, then, can it be held that the obligation of the contract is not impaired by an act which unconditionally exempts or releases the person of the stockholder from this liability? I think that upon principle the exemption or release cannot be sustained, and that the act which authorizes it must be held to be unconstitutional.

28 I am aware that this conclusion is not supported by the authority of any decision which is exactly in point, but that, on the contrary, there are many cases, some of them in the Supreme Court of the United States, in which it has been broadly declared that a State has the power to abolish the remedy by imprisonment, even without reservation in respect of antecedent contracts. I think, however, it will be found, on examination, that this language was used, in most of the cases, when a more guarded expression would have answered as well, and where, for anything that appears, the distinctions which we have indicated were not present to the mind of the court. (See Bronson v. Newberry, 2 Dougl. Mich., 38, and the extract from Judge Swift's commentaries there cited.) I think, too, if we look through the language to the grounds of decision—the ratio decidendi, as it has been termed—the conclusion which I have reached is inevitable.

I must therefore withhold my concurrence with the opinions of a majority of the court.

29 *Decree.*

PROVIDENCE, *sc.:*

Supreme court, October term, A. D. 1877.

In the matter of Lucius S. Penniman. Petition for writ of habeas corpus.

This cause came on to be heard at this term upon said petition and

the writ issued thereon and the return made thereto, and it appeared that said petitioner claimed to be discharged from his commitments on executions, set out in the return to said writ, by virtue and force of the first section of the act of the general assembly, passed at the January session, A. D. 1877, to wit, March 27, 1877, entitled "An act defining and limiting the mode of enforcing the liability of stockholders for the debts of corporations," and being chapter 600 of the general statutes or public laws of this State, and that such discharge was opposed by the committing creditors, respectively, on the ground that said section of said act of the general assembly is repugnant to and in violation of section ten of article one of the Constitution of the United States of America, as impairing the obligation of their respective judgments, upon which such commitments were had, and of their respective contracts on which such judgments were founded, and therefore unconstitutional and void; and counsel for the respective parties were fully heard thereon, and now, after consideration thereof, it is adjudged that said section of said chapter 600 is valid and constitutional, and that said petitioner, by force and virtue of said section one of said chapter 600, is entitled to be discharged from further custody under said
30 commitments, and it is ordered that he be forthwith discharged therefrom accordingly.

Entered as the decree of the court, the 64th day of the October term, A. D. 1877, for the county of Providence, being December 15, 1877.

CHARLES BLAKE, *Clerk.*

Filed 64th day O. T., 1877.

C. B., *Clk.*

Record of judgment.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,
Providence, sc:

At the supreme court of said State, begun and holden at Providence, within and for the county of Providence, on the first Monday of October, in the year one thousand eight hundred and seventy-seven.

Be it remembered that at the March term of this court, A. D. 1877, Lucius S. Penniman preferred his petition representing that he is a citizen of the commonwealth of Massachusetts, residing in Blackstone, in said commonwealth; that he was then illegally detained and imprisoned by Nelson Viall, in the Providence County jail, in the city of Providence, under the pretended authority of a certain second pluries execution issued from the court of common pleas February 8, 1876, upon a certain judgment rendered by said court of common pleas February 25, 1871, against the American Steam & Gas Pipe Company, a
31 corporation of said Providence, in favor of Charles S. Perham, of Boston, in the said commonwealth, and also under the pretended authority of a certain alias execution, issued from this court May 31, 1876, upon a certain judgment thereof, rendered at its March term, A. D. 1871, against said American Steam & Gas Pipe Co., in favor of William Tweedle, of said Providence, and praying for a writ of habeas corpus, directed to said Viall, commanding him to have the body of the petitioner forthwith before this court, together with the day and cause of his taking and detaining, and for a discharge from further imprisonment and restraint under said commitments. Upon the entering of said petition a citation was ordered and issued, directed to said William Tweedle, and James Tillinghast, and Joseph C. Ely, copartners as Tillinghast & Ely, attorneys for said Charles S. Perham, citing them to

show cause why the prayer thereof should not be granted, and upon the return of said citation said petition was heard, and thereupon the court ordered the writ of habeas corpus as prayed for to issue, returnable forthwith. Upon the return of said writ the court ordered that said Penniman be released upon bail, upon giving bond to each of his committing creditors, with Henry L. Aldrich and George B. Earle as sureties, said bond to said Perham being in the sum of $15,000, and to said Tweedle in the sum of $2,500, for his appearance before the court when required, and for his return to the custody of the jailor of the Providence County jail in case said writ should be dismissed;
32 and said bonds having been given the matter was postponed for further hearing until April 4, 1877, on which day a further hearing took place.

The petition was thence continued to the present term of this court, and on the 53d day thereof the opinion of the court was read, and on the 64th day thereof the following decree was entered:

PROVIDENCE, *sc:*

Supreme Court, October term, A. D. 1877.

In the matter of Lucius S. Penniman. Petition for writ of habeas corpus.

This cause came on to be heard at this term upon said petition and the said writ issued thereon and the return made thereto, and it appears that said petitioner claimed to be discharged from his commitments on executions set out in the return to said writ by virtue and force of the first section of the act of the general assembly, passed at the January session, A. D. 1877, to wit, March 27, 1877, entitled "An act defining and limiting the mode of enforcing the liability of stockholders for the debts of corporations," and being chapter 600 of the general statutes or public laws of this State, and that such discharge was opposed by the committing creditors respectively on the ground that said section of said act of the general assembly is repugnant to and in violation of section ten of article one of the Constitution of the United States of America, as impairing the obligation of their respective judgments, upon which such comments were had, and of their respective contracts on which such judgments were grounded, and therefore unconstitutional
33 and void. And counsel for the respective parties were fully heard thereon, and now, after consideration thereof, it is adjudged that said section of said chapter 600 is valid and constitutional, and that said petitioner, by force and virtue of said section one of said chapter 600, is entitled to be discharged from further custody under said commitments, and it is ordered that he be forthwith discharged therefrom accordingly.

Entered as the decree of the court the 64th day of the October term, A. D. 1877, for the county of Providence, being December 15, 1877.

CHARLES BLAKE, *Clerk.*

34 (Original.)

UNITED STATES OF AMERICA,
District of Rhode Island, ss:

The President of the United States of America to the honorable the judges of the supreme court of the State of Rhode Island and Providence Plantations:

Because in the record and proceedings, as also in the rendition of a

judgment of a plea which is in the said supreme court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could have been had in the said suit between Lucius S. Penniman, of Blackstone, in the county of Worcester and commonwealth of Massachusetts, petitioner, to be discharged from his detention and imprisonment by Nelson Viall, in the Providence County jail, in the city of Providence, in said State of Rhode Island, jailor, and said Nelson Viall, jailor, and Charles S. Perham, of Boston, in the county of Suffolk & said commonwealth of Massachusetts, and William Tweedle, of said Providence, committing creditors, wherein was drawn in question the validity of a statute of said State of Rhode Island, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of such its validity, a manifest error has happened, to the great damage of the said Nelson Viall, jailor, Charles S. Perham, and William Tweedle, committing creditors, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and the proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, at Providence, in said district of Rhode Island, this twenty-sixth day of December, A. D. eighteen hundred and seventy-seven.

[SEAL.]

HENRY PITMAN,
Clerk U. S. Circuit Court, R. I. District.

Allowed by—

THOMAS DURFEE,
Chief Justice of the Supreme Court State of Rhode Island and Providence Plantations.

(Indorsed:) 1289. In re Lucius S. Penniman. Habeas corpus. Writ of error. Nelson Viall, jailer, et al., pl'fs in error, v. Lucius S. Penniman, def. in error. Filed by Harvey N. Shepard, esq., of counsel for plaintiffs in error, in clerk's office supreme court State of Rhode Island, Dec. 26, 1877.

35 *Copy of the original writ of error lodged in the court for the adverse party.*

UNITED STATES OF AMERICA,
District of Rhode Island, ss:

The President of the United States of America to the honorable the judges of the supreme court of the State of Rhode Island and Providence Plantations:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said supreme court before you or some of you, being the highest court of law or equity of the said State in

which a decision could have been had in the said suit between Lucius S. Penniman of Blackstone, in the county of Worcester and commonwealth of Massachusetts, petitioner, to be discharged from his detention and imprisonment by Nelson Viall, in the Providence County jail, in the city of Providence, in the said State of Rhode Island, jailer, and said Nelson Viall, jailer, and Charles S. Perham of Boston, in the county of Suffolk, said commonwealth of Massachusetts, and William Tweedle, of said Providence, committing creditors, wherein was drawn in question the validity of a statute of said State of Rhode Island, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of such its validity, a manifest error has happened, to the great damage of the said Nelson Viall, jailer, Charles S. Perham and William Tweedle, committing creditors, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the
36 record and the proceedings aforesaid, with all the things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, at Providence, in said district of Rhode Island, this twenty-sixth day of December, A. D. eighteen hundred and seventy-seven.

{ SEAL OF CIRCUIT COURT } { RHODE ISLAND. }

HENRY PITMAN,
Clerk U. S. Circuit Court, R. I. District.

Allowed by—

THOMAS DURFEE,
Chief Justice of the Supreme Court of the State of Rhode Island and Providence Plantations.

A true copy. Attest:

CHARLES BLAKE,
Clerk Supreme Court State of Rhode Island and Providence Plantations.

Filed by Harvey N. Shepard, esq., of counsel for plaintiffs in error, in clerk's office, supreme court of State of Rhode Island, Dec. 26, 1877

37 To Lucius S. Penniman, of Blackstone, in the county of Worcester and commonwealth of Massachusetts, the United States of America, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Rhode Island and Providence Plantations, wherein Nelson Viall of Providence, in the county of Providence and said State, jailer of the Providence County jail, in said city of Providence, Charles S. Perham, of Boston, in the county of Suffolk and commonwealth of Massachusetts, and William Tweedle, of said

Providence, committing creditors, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why a judgment of a plea rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Thomas Durfee, chief justice of the supreme court of the State of Rhode Island and Providence Plantations, at Providence, this twenty-sixth day of December, A. D. 1877.

THOMAS DURFEE.

On this twenty-sixth day of December, A. D. 1877, personally appeared Albert C. Johnson, deputy sheriff in and for the county of Providence, State of Rhode Island, before me, the subscriber, Charles Blake, clerk of the supreme court of the State of Rhode Island and Providence Plantations, and makes oath that he delivered a true copy of the within citation to John D. Thurston, esq., of said Providence, attorney of record of the within named Lucius S. Penniman, defendant in error.

In testimony whereof I hereto subscribe my name and affix the seal of said supreme court, at Providence, in the county of Providence and State of Rhode Island, the day and year above written.

[SEAL.] CHARLES BLAKE, *Clerk.*

(Indorsed:) In re Lucius S. Penniman. Habeas corpus. 1289. Citation. Nelson Viall, jailer, et al., plaintiffs in error, vs. Lucius S. Penniman, defendant in error. Filed by Harvey N. Shepard, esq., of counsel for plaintiffs in error, in clerk's office supreme court State of Rhode Island. Dec. 26, 1877.

38 *Bond to L. S. Penniman.*

Know all men by these presents that we, Charles S. Perham, of Boston, in the county of Suffolk and commonwealth of Massachusetts, William Tweedle, of Providence, in the county of Providence and State of Rhode Island, as principals, and John W. Tillinghast, of said Providence, as surety, are held and firmly bound unto Lucius S. Penniman, of Blackstone, in the county of Worcester and said commonwealth of Massachusetts, in the full and just sum of two hundred and fifty dollars, to be paid to the said Lucius S. Penniman, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this twenty-sixth day of December, A. D. 1877.

Whereas lately, on a suit of said Lucius S. Penniman to be discharged from his detention and imprisonment by Nelson Viall in the Providence County jail, in the city of Providence, in the State of Rhode Island and Providence Plantations, said Nelson Viall holding him, said Lucius S. Penniman, under the authority of a certain pluries execution issued from the court of common pleas of said State of Rhode Island and Providence Plantations on the 8th day of Feb., 1876, upon a certain judgment rendered by the said court of common pleas on the 25th day of
39 Feb., 1871, against the American Steam and Gas Pipe Company, a corporation of said Providence, in favor of Charles S. Perham, and also under the authority of a certain alias execution issued from the supreme court of said State of Rhode Island and Providence Plantations on the 31st day of May, 1876, upon a certain judgment rendered by said supreme court at its M'ch term 1871 against said American Steam and Gas Pipe Company in favor of William Tweedle, of said

Providence; said suit depending in said supreme court of said State of Rhode Island and Providence Plantations between said Lucius S. Penniman, petitioner, and said Nelson Viall, jailer, and said Charles S. Perham and Wiliam Tweedle, committing creditors, a decree was rendered in favor of said Lucius S. Penniman, petitioner, discharging him from further custody under said commitments, and against the said Nelson Viall, jailer, and the said Charles S. Perham and William Tweedle, committing creditors, and the said Viall, Perham, and Tweedle have obtained a writ of error and filed a copy thereof in the clerk's office of the said supreme court of the State of Rhode Island and Providence Plantations to reverse the said decree in the above-entitled suit, and a citation directed to the said Lucius S. Penniman, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such that if the
40 said Nelson Viall, Charles S. Perham, and William Tweedle shall prosecute said writ of error to effect, and answer all damages and costs if said Viall, Perham, and Tweedle fail to make their plea good, then the obligation to be void, else to remain in full force and virtue.

CHARLES S. PERHAM. [L. S.]
WILLIAM TWEEDLE. [L. S.]
JOHN W. TILLINGHAST. [L. S.]

Sealed and delivered in presence of—
HARVEY N. SHEPARD.

Approved by—

THOMAS DURFEE,
Chief Justice of the Supreme Court State of Rhode Island and Providence Plantations.

Filed Dec. 26, 1877.

C. B., *Clk.*

Filed by Harvey N. Shepard, esq., of counsel for plaintiff in error, in clerk's office, supreme court State of Rhode Island, Dec. 26, 1877.

41 *Clerk's certificate.*

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,
Providence, sc.:

CLERK'S OFFICE, SUPREME COURT,
Providence, October 9th, A. D. 1878.

I, Charles Blake, clerk of the supreme court of said State, within and for the county of Providence, do hereby certify that the writings annexed to this certificate are true copies of their respective originals on file and remaining of record in said clerk's office in the matter of the petition of Lucius S. Penniman for writ of habeas corpus; also of the opinion of said supreme court in said matter.

And I further certify that the original writ of error and the original citation thereon also accompany and are attached to this certificate.

In attestation whereof I hereto subscribe my name and affix the seal of said court at Providence, in said county and State, this 9th day of October, A. D. 1878.

[SEAL.] CHARLES BLAKE, *Clerk.*

(Indorsement on cover:) No. 281. Nelson Viall, jailer, Charles S. Perham, Wm. Tweedle, committing creditors, plaintiffs in error, vs. Lucius S. Penniman. Rhode Island sup. court. Filed 17th October, 1878.

Supreme Court of the United States.

NELSON VIALL, JAILER, ET AL.,

v.

LUCIUS S. PENNIMAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND.

BRIEF FOR THE PLAINTIFFS IN ERROR.

Supreme Court of the United States.

NELSON VIALL, *Jailer, et al.*,

v.

LUCIUS S. PENNIMAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND.

BRIEF FOR THE PLAINTIFFS IN ERROR.

STATEMENT.

William Tweedle, of Providence, one of the plaintiffs in error, recovered judgment against the American Steam and Gas Pipe Company, a manufacturing corporation created by the General Assembly of Rhode Island and established in the city of Providence, and subject to the provisions of the following Acts concerning manufacturing corporations.

Gen. Stat. R. I., Cap. 142, Sect. 11. "Every manufacturing corporation included within the provisions of this chapter shall file in the town clerk's office of the town where the manufactory is established, annually, on or before the fifteenth day of February, a certificate signed by a majority of the directors truly stating the amount of its capital stock actually paid in, the value as last assessed for a town tax of its real estate, the balance of its personal assets, and the amount of its debts."

Gen. Stat. R. I., Cap. 142, Sect. 12. "If any of said companies shall fail so to do, all the stockholders of said company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be

Supreme Court of the United States.

NELSON VIALL, *Jailer, et al.*,

v.

LUCIUS S. PENNIMAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND.

BRIEF FOR THE PLAINTIFFS IN ERROR.

STATEMENT.

William Tweedle, of Providence, one of the plaintiffs in error, recovered judgment against the American Steam and Gas Pipe Company, a manufacturing corporation created by the General Assembly of Rhode Island and established in the city of Providence, and subject to the provisions of the following Acts concerning manufacturing corporations.

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Gen. Stat. R. I., Cap. 142, Sect. 12. "If any of said companies shall fail so to do, all the stockholders of said company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be

contracted before such notice shall be given, unless such company shall have been insolvent and assigned its property in trust, for the benefit of its creditors, in which case the obligation to give notice by the filing of such certificate shall cease."

Gen. Stat. R. I., Cap. 142, Sect. 20. "Whenever the stockholders of any manufacturing company shall be liable by the provisions of this chapter to pay the debts of such company, or any part thereof, their persons and property may be taken therefor on any writ of attachment or execution issued against the company for such debt in the same manner as on writs and executions issued against them for their individual debts."

Gen. Stat. R. I., Cap. 142, Sect. 21. "The person to whom said officers or stockholders may render themselves liable as aforesaid may, instead of the proceeding aforementioned, have his remedy against said officers or stockholders by a bill in equity in the Supreme Court."

Lucius S. Penniman, the defendant in error, was a member of said corporation, and on the execution issued against said corporation in favor of said Tweedle, for want of the goods and chattels of the corporation, or of said Penniman, the officer committed said Penniman to jail, the certificate required to exempt him from personal liability never having been filed in the city clerk's office, as provided by the above Acts. Penniman was also committed on a similar execution against said corporation in favor of Charles S. Perham, of Boston, one of the plaintiffs in error.

The legality of the commitments has been determined.

Penniman, petitioner, 11 R. I. 333.

Penniman did not take nor offer to take the poor debtors' oath, but applied to the Supreme Court of the State of Rhode Island for his release under the following Act, passed by the General Assembly of Rhode Island, on March 27, A. D. 1877, while he was in jail under said commitments: —

CHAPTER 600.

AN ACT DEFINING AND LIMITING THE MODE OF ENFORCING THE LIABILITY OF STOCKHOLDERS FOR THE DEBTS OF CORPORATIONS.

It is enacted by the General Assembly as follows:—

SECTION 1. No person shall hereafter be imprisoned, or be continued in prison, nor shall the property of any such person be attached, upon an execution issued upon a judgment obtained against a corporation of which such person is or was a stockholder.

SECT. 2. All proceedings to enforce the liability of a stockholder for the debts of a corporation shall be either by suit in equity, conducted according to the practice and course of equity, or by an action of debt upon the judgment obtained against such corporation; and in any such suit or action such stockholder may contest the validity of the claim upon which the judgment against such corporation was obtained upon any ground upon which such corporation could have contested the same in the action in which such judgment was recovered.

SECT. 3. All Acts and parts of Acts inconsistent herewith are hereby repealed.

SECT. 4. This Act shall take effect from and after the date of the passage thereof.

His discharge was opposed by said Tweedle and Perham, committing creditors and plaintiffs in error, respectively, on the ground that the first section of the above Act of the General Assembly, by virtue and force of which said Penniman claimed to be discharged from said commitments, is repugnant to and in violation of Sect. 10 of Art. I. of the Constitution of the United States of America as impairing the obligation of their respective judgments, upon which such commitments were had, and of their respective contracts on which such judgments were founded, and therefore unconstitutional and void. It was adjudged by said Supreme Court of the State of Rhode Island that said section of said Chap. 600 is valid and constitutional, and that said Penniman, by force and virtue of said section, was entitled to be discharged from further custody under said commitments. And it was ordered that he be forthwith discharged accordingly.

Assignment of Errors.

The adjudication by said Supreme Court of the State of Rhode Island that said first section of said Chap. 600 is not repugnant to and in violation of Sect. 10 of Art. I. of the Constitution of the United States of America as impairing the obligation of the respective judgments upon which said commitments were had and of the respective contracts on which such judgments were founded, and therefore unconstitutional and void; but that said section is valid and constitutional, and that said Penniman by force and virtue thereof was entitled to be discharged from further custody under said commitments, and the discharge of said Penniman accordingly.

Argument.

I.

Previous to the enactment of Chap. 600 the liability of the stockholders in said corporation was original, direct, and absolute; substantially that of a partner, as though the debt had been created in their name by some agent acting for them.

Conant *v.* Van Schaick, 24 Barb. S. C. 89.
Corning *v.* McCullough, 1 N. Y. 47.

Nor can this liability be a surprise to them if they exercise due diligence in examining the public records.

Curtis *v.* Harlow, 12 Met. (Mass.) 3.

The remedy of a creditor was similar to that given in Ohio, Indiana, and several Western States, allowing a creditor of a partnership to sue the firm by its firm name (Smith *v.* A. B. & Co.), without making any of the partners parties defendant to the record; the judgment binding those partners who were served with process in the suit or who appeared without such service, and extended to the other partners by

a special proceeding, in which special proceeding no question can be raised of the indebtedness of said firm to said creditor.

Chap. 600 changes and lessens the liability of the stockholders in said corporation by making it derivative, secondary, and conditional; substantially that of a surety or guarantor, and indeed somewhat less than that of an ordinary surety.

Previous to the enactment of Chap. 600 there was one contract, that of the stockholder, although made by the corporation, since said enactment there are two contracts, distinct and different: first, that of the corporation, second, that of the stockholder, which is made to grow out of the first and is conditional upon the failure of the creditor to satisfy his judgment against the corporation itself upon its contract. Previously the stockholder was answerable for his own debt, and an action against the corporation was an action against him, and a judgment against the corporation was a judgment against him. Now the stockholder is answerable for the debt of another, the corporation, and an action against the corporation is a necessary preliminary step, but it establishes nothing.

It follows from these considerations that Chap. 600 directly impairs the obligation of the stockholder's contracts; and the obligation of the contracts made by and between said Tweedle and Perham, plaintiffs in error, and said Penniman, the defendant in error.

II.

The first section of Chap. 600 completely abolishes the remedy at law given by previous statutes for the enforcement of a stockholder's liability, a remedy convenient and summary, and substitutes for it a remedy which is dilatory, expensive, and uncertain. The obligation of the contract is thereby impaired, notwithstanding the new remedy and the retention of the former remedy in equity.

Guild *v.* Rogers, 8 Barb. S. C. 502.

Van Rensselaer *v.* Snyder, 9 Barb. S. C. 302; 13 N. Y. 299.

Conkey *v.* Hart, 14 N. Y. 22, 30.
Pomeroy on Constitutional Law, Sect. 609.

By Sect. 1 of Chap. 600, no remedy is left against a stockholder on the execution against the corporation; nor has he a remedy by Sect. 2 unless the previous judgment is reopened.

The decisions of this Court (followed by the State courts) have given a uniform construction to the constitutional provision which prohibits a State from passing any law impairing the obligation of contracts. From them the following propositions are deduced: —

1. The obligation of a contract is the duty of performance according to its terms, the remedy or means of enforcement being a part of the obligation which a State cannot, by legislation, impair. The municipal law enters into and forms a part of this obligation, and to that the contracting parties must be considered as referring, in order to enforce performance.

Lapsley *v.* Brashears, 4 Litt. (Ky.) 65.
1 Bac. Abrid. Tit. Actions in General, Letter B.

2. The remedy is inseparable from the obligation; as otherwise the contract would be of the nature of those imperfect obligations or moral duties which are subject to the mere caprice of the individual.

Townsend *v.* Townsend, 1 Peck. (Tenn.) 1.
Riggs *et al. v.* Martin, 5 Pike, 506.

3. The State, if it modifies the remedy, must provide one as speedy, efficient, and substantial as that subsisting when the contract was made.

1 Kent (12th Ed.), Sect. 456, *note a.*
Sedgwick on Stat. and Const. Law, 630.
Pomeroy's Constitutional Law, Sect. 609.
Jones *v.* Crittenden, 1 Car. L. R. 385.
Johnson *v.* Duncan, 3 Mart. 531.

Bailey *v.* Gentry *et ux.*, 1 Mo. 164.
Bungardner *v.* Circuit Court, 4 Mo. 50.
Stevens *v.* Andrews, 31 Mo. 205.
Willard *v.* Longstreet, 2 Dougl. (Mich.) 172.
Mundy *v.* Munroe, 1 Mich. 68.
Cargill *v.* Power, 1 Mich. 369.
Neritt *v.* Bank, 14 Miss. 513.
Scobey *v.* Gibson, 17 Ind. 572.
Inglehardt *v.* Wolfin, 20 Ind. 32.
Rosier *v.* Hale, 10 Iowa, 470.
Maloney *v.* Fortune *et ux.*, 14 Iowa, 417.
Lockett *v.* Usey, 28 Ga. 345.
Taylor *v.* Stearns *et al.*, 18 Grat. 244.
Jones *v.* McMahan, 30 Texas, 719.
Bunn *v.* Gorgas, 41 Penn. St. 441.
Penrose *v.* Erie Canal Co., 56 Penn. St. 46.
Edwards *v.* Kearzey, 96 U. S. 607.

4. While the State may prescribe the mode of suit and forms of process, it cannot clog the remedy with conditions and restrictions so as materially to impair its efficiency.

Cooley's Const. Limit., Sect. 284.
Oliver *v.* McClure, 28 Ark. 555.
Fletcher *v.* Peck, 6 Cranch, 87.
Sturgis *v.* Crowninshield, 4 Wheat. 122.
Green *et al. v.* Biddle, 8 Wheat. 1.
Ogden *v.* Saunders, 12 Wheat. 213.
Bronson *v.* Kinzie *et als.*, 1 How. 311.
McCracken *v.* Hayward, 2 How. 608.
Gantley's Lessees *v.* Ewing, 3 How. 707.
Planters' Bank *v.* Sharp *et al.*, 6 How. 301.
Curran *v.* State of Arkansas *et al.*, 15 How. 304.
Hawthorne *v.* Calef, 2 Wall. 10.
Van Hoffman *v.* City of Quincy, 4 Wall. 535.
White *v.* Hart, 13 Wall. 646.
Gunn *v.* Barry, 15 Wall. 610.
Walker *v.* Whitehead, 16 Wall. 314.

Therefore Chap. 600 is, so far as regards prior contracts, unconstitutional.

Viall *et al. v.* Penniman, record printed, p. 17. (Opinion of Stiness, J.)

III.

Chap. 600 is a connected whole; its provisions are dependent on each other and operate together for the same purpose; and it is not to be presumed that the General Assembly would have passed one provision without the other. Therefore the chapter being unconstitutional in its other provisions, it is also unconstitutional in so far as it prohibits imprisonment on an execution against the corporation.

Cooley's Const. Limit., p. 78.
Wynehamer *v.* The People, 13 N. Y. 442.
Warren *v.* Charlestown, 2 Gray, 84.
Oatman *v.* Bond, 15 Wis. 20.
Mesheimer *v.* State, 11 Ind. 484.
Eckhart *v.* State, 5 W. Va. 515.

IV.

Even supposing the different clauses of the chapter are not so interdependent, and that the provision against imprisonment may be separated from the rest, the provision in itself is unconstitutional.

It utterly takes away the right of imprisonment on an execution against the corporation, even upon proof of fraud. This defendant in error was liberated by the simple fiat of the Legislature, though he had not taken the poor debtors' oath, and fairly might be presumed to have abundant means so invested or concealed that they could not be reached by any process running simply against his property.

It is settled that a State may authorize the liberation of a debtor upon judicial proof of his insolvency. If a debtor has no property wherewith to pay his debt, imprisoning him cannot oblige him to pay it, and therefore it does not im-

pair the obligation of his contract to exempt or release him from imprisonment.

Oriental Bank *v.* Freeze, 6 Shepley, 109.
Kendall *v.* Dodge, 3 Vt. 360.
Woodfin *v.* Hooper, 4 Humph. 13.
Bronson *v.* Newberry, 2 Dougl. (Mich.) 38.
Newton *v.* Tibbats, 7 Ark. 150.
Donnelly *v.* Corbett, 7 N. Y. 500.
In re Jos. B. Nichols, 8 R. I. 50–54.
Sturgis *v.* Crowninshield, 4 Wheat. 122.
Mason *v.* Haile, 12 Wheat. 370.
Beers *et al. v.* Houghton, 9 Pet. 329.
Gray *et al. v.* Munroe *et al.*, 1 McLean, 528.
Terry *v.* Anderson, 95 U. S. 632.
Edwards *v.* Kearzey, 96 U. S. 595–602.

In all the above cases the statute abolishing imprisonment contains ample provisions to compel a discovery of the debtor's property, or takes effect after the prisoner had taken the poor debtors' oath. They are not applicable to a case like the present, where the law allows the debtor to go at large without any evidence of his insolvency, and does not allow the creditor to detain him even upon proof that he is abundantly solvent; and when the defendant in error had agreed that he would be liable, in his person as well as in his property, on an execution against the corporation.

Hawthorne *v.* Calef, 2 Wall. 10.

Respectfully submitted by

C. H. HILL,
HARVEY N. SHEPARD.

OFFICE SUPREME COURT U.S.
FILED
FEB 21 1881
JAMES H. McKENNEY, Clerk

Supreme Court of the United States.

No. 281.

NELSON VIALL, JAILER, AND CHARLES S. PERHAM AND WILLIAM TWEEDLE,

COMMITTING CREDITORS, PLAINTIFFS IN ERROR.

vs.

LUCIUS S. PENNIMAN,

DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT, OF THE STATE OF RHODE ISLAND.

Brief for Defendant in Error.

BENJAMIN F. THURSTON,

Of Counsel for Defendant in Error.

Supreme Court of the United States.

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PLAINTIFFS IN ERROR.

vs.

LUCIUS S. PENNIMAN.

DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND.

BRIEF FOR DEFENDANT IN ERROR.

Penniman, the above named petitioner, being a resident of Blackstone, in the State of Massachusetts, was on the fourth day of May, 1871, committed to the Providence County jail, at Providence, R. I., on a second pluries execution issued against the American Steam and Gas Pipe Co., a corporation theretofore

doing business at said Providence, of which said petitioner was a stockholder, said execution being in favor of one of the plaintiffs in error, Charles S. Perham, of Boston, Mass.

On the fifth day of June following, the petitioner was again committed to said jail, on an alias execution issued against the same corporation in favor of the plaintiff in error, William Tweedle (see pages 1 and 2 of Record).

These two commitments were, by virtue of that provision of the Statutes of Rhode Island (Gen. Stat. R. I., Chap. 142, § 20,) which provides that in certain cases, *i. e.*, when the corporation does not make the return required by section 11 of the same chapter, the persons and property of the stockholders may be taken for a debt of the corporation "on any writ of attachment or execution issued against the company for such debt, in the same manner as on writs and executions issued against them for their individual debts.

Thereafterwards, on the 27th of March, 1877, and while said petitioner was confined in prison under said commitments, the General Assembly of Rhode Island passed an act which provided in the first section thereof that thereafter no person should be imprisoned or continued in prison upon an execution issued upon a judgment obtained against a corporation of which person was a stockholder (see copy of Chap-

ter 600 of the Public Laws of Rhode Island, page 8 of Record).

Thereafterwards, on the twenty-eighth day of March, 1877, said Penniman filed his petition for a writ of *habeas corpus* (see Record, page 1), and said writ was issued on the thirtieth day of March, 1877 (see Record, page 4).

The jailer thereupon made his returns, according to law, attaching thereto copies of the two commitments aforesaid, by virtue of which he held said petitioner in custody (see pages 4, 5 and 6 of Record).

Afterwards, on the thirty-first day of March, 1877, said petitioner was released from custody upon giving bond to appear before said Supreme Court whenever required, to abide the final order of said Court, and, in case said writ should be dismissed, to return to the custody of said jailer (see pages 6 and 7 of Record).

Subsequently, at the October term of the Supreme Court (1877), said petition was heard, and thereafterwards, on the third day of December, 1877, said Court delivered an opinion, ordering the discharge of said petitioner, and sustaining the validity of said Act of the General Assembly, as not repugnant to Sec. 10, Art. I., of the Constitution of the United States.

Thereafterwards, on the twenty-sixth day of December, 1877, said creditors sued out their writ of error to the Supreme Court of Rhode Island, alleging as error,

the decision of said state court sustaining the validity of said act.

The only matter in question, therefore, in this cause is whether or not the above act of the General Assembly of Rhode Island is in contravention of that article of the Constitution of the United States which prohibits any state from passing any law impairing the obligation of contracts; or, in other words, did said act, by releasing the petitioner from the imprisonment which he was suffering at the hands of his creditors, impair the obligation of the implied contract into which he entered by becoming a stockholder in said corporation.

It was decided at an early day by the Supreme Court of the United States, that those acts did not impair the obligation of a contract which extended only to the modification or variation of a remedy, even though the new remedy was less convenient and speedy, provided that some substantive remedy was left; that imprisonment is no part of the contract, and that the release of the prisoner does not impair its obligation.

In *Sturges* vs. *Crowninshield*, 4 Wheaton, 122, Chief Justice Marshall, in delivering the opinion of the Court, says: "The distinction between the obligation of a contract and the remedy given by the Legislature to enforce that obligation, has been taken

at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct. Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the State may refuse to inflict this punishment, or may withhold this means, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation."

In *Mason* vs. *Haile*, 12 Wheaton, 370, the action was upon a jail limit bond, the defence being that the defendant, while so confined to the limits, was discharged from imprisonment by a special act of the General Assembly of Rhode Island, granting to him the benefit of the insolvent act of 1756. It was contended that the act granting the defendant his discharge was in violation of the Constitution of the United States, as impairing the obligations of a contract. It was held by the Court that the act did not have this effect. The Court say: "Can it be doubted but that the legislatures of the states, so far as relates to their own process, have a right to abolish imprisonment for debt altogether, and that such law might extend to present as well as future imprisonment? We are not aware that such a power in the states has ever been questioned. . . . Such laws act

merely upon the remedy, and that in part only." Although in this case Judge Washington dissents from the majority of the Court, he fully concurs, so far as the above doctrine is concerned. He says: "It was stated in the case alluded to (*Sturges* vs. *Crowninshield*), that imprisonment of the debtor forms no part of the contract, and consequently that a law which discharges his person from confinement, does not impair its obligation. This I admit, and the principle was strictly applicable to a contract for the payment of money. . . . I admit the rights of a State to put an end to imprisonment for debt altogether."

In affirmance of the same doctrine are the following decisions of this Court:—

Ogden vs. *Saunders*, 12 Wheat. 230.
Beers vs. *Haughton*, 9 Peters, 359.
Van Hoffman vs. *City of Quincy*, 4 Wall, 553.
Tennessee vs. *Sneed*, 6 Otto, 69.

There are a number of cases decided in several of the state courts, maintaining the position contended for by this defendant in error; but as the question has been so often and so unanimously passed upon by this Honorable Court, it is deemed unnecessary to cite them.

BENJ. F. THURSTON.